NO. 49453-1-II

IN THE COURT OF APPEALS OF THE STATE OF

WASHINGTON DIVISION II

END PRISON INDUSTRIAL COMPLEX
Appellant/Plaintiff,

v.

KING COUNTY
Appellee/Defendant

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JUDGE CUTHBERTSON

BRIEF OF APPELLANTS

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I. INTRODUCTION

The simple question presented in this case is whether a local government must comply with the levy lid lift statute, RCW 84.55.050, which requires *informed* voter approval before a "single year" levy lid lift can be used to calculate future years' levies, thereby extending the approved tax increase to later years without required voter approval. Here, King County presented voters with a ballot title that failed to include the clear and objective information that the statute specifically requires. Because the County presented voters with a title that was statutorily insufficient, deceptive, and ambiguous, King County did not have voter approval to implement the single year levy in the ways it admits to doing, resulting in the County's over-collection of millions of dollars of taxes from King County property owners.

Appellant EPIC has brought this appeal to challenge King County's over-collection of property taxes, in direct violation RCW 84.55.050, the statute that allows voters to raise their property taxes above certain statutory limits through what's known as a "levy lid lift." Over the years, the State Legislature has carefully delineated the process and limits for increasing property taxes under a levy lid lift, requiring *informed* consent of voters and limiting the number of years that taxes can be raised under this mechanism. To ensure true majority consent of voters, the Legislature adopted *very*

explicit requirements for ballot titles seeking voter approval of a lid lift. This ensures that a majority of voters understand and approve the specific tax proposal put before them.

King County ignored the requirements of RCW 84.55.050 in implementing King County Proposition One ("Prop. 1") and has collected taxes in excess of what voters approved. King County will ask this Appellate Court to look the other way and to disregard the statute's explicit limits and ballot title mandates, but these arguments must be soundly rejected.

Neither local governments nor this Court can disregard the explicit voter approval requirements of the levy lid lift statute. The voters, by initiative, have favored strict limits on property tax increases, which can only be exceeded with voter approval. When one such initiative was declared unconstitutional, the governor called a special session and the Legislature reenacted the measure's strict and controversial property tax limits. The Legislature then gave teeth to these policies by requiring that ballot title for levy lid lift measures include *certain specific information;* information that is completely lacking from the ballot title at issue here.

This Court must simply apply the explicit statutory requirements to the County's levy lid lift measure, Prop. 1. Doing so will lead to the conclusion that the County presented voters with a ballot title that

authorized a one year property tax increase, but that the County has thereafter proceeded to illegally implement Prop. 1 to collect more taxes than were authorized. The Court should then remand to the trial court for appropriate remedies.

In addition, this Court should hold that the ballot title did not contain an "express" and "clear" limitation on how the levy proceeds would be used, which is required to trigger the optional "use limitation" provision of RCW 84.55.050.The title's vague statement that the levy would fund a "children and family justice center, which serves the justice needs of children and families" is neither express nor clear, and certainly did not disclose a proposal to build a new 156-cell youth jail. Because the title did not trigger the optional use limitation provision the County is free to use Prop. 1's *lawful* levy proceeds to fund evidence-based projects to address juvenile justice and reduce youth incarceration.

This is the first appellate case on RCW 84.55.050, a statute fundamental to our system of local government finance. Enforcing the statute as written will maintain predictability in local government finance and ensure that voters receive the information that the Legislature has determined is necessary for informed consent.

The trial court did not resolve these issues because it determined that a taxpayer can only challenge illegal collection of taxes under a levy

if they first brought a pre-election ballot title challenge. That holding fails to recognize that EPIC is not challenging a ballot title; it is ***enforcing the ballot title*** that was placed on the ballot and approved by voters. RCW 84.55.050 made the ballot title the operative document that constrains how much taxes King County can collect. The fact that nobody challenged the ballot title cannot immunize the County's illegal collection of taxes.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in allowing King County to collect and retain more property taxes than the voters authorized by the passage of King County Proposition 1 in 2012.

B. The trial court erred by failing to rule that the *lawful* proceeds of King County Prop. 1 could be used for any lawful purpose because the Prop. 1 ballot title failed to trigger the optional "use limitation" provision of RCW 84.55.050.

C. The trial court erred in holding that a government's illegal implementation of a levy is beyond judicial review unless the plaintiff previously brought a pre-election ballot title appeal.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Has King County unlawfully implemented Prop. 1 to collect and retain more property taxes than the voters approved?

B. Did the ballot title presented to voters on Prop. 1 "expressly state" that the 2013 levy amount would be used to compute the limitation for subsequent levies, as required by RCW 84.55.050(3) and (4)?

C. If King County did not have voter approval to extend the "single year" levy lid lift to multiple years., is King County unlawfully implementing Prop. 1 as a nine-year "multiple year" levy lid lift, which are statutorily limited to six years.?

D. Did the ballot title presented to voters on Prop. 1 "expressly state" the limited purpose for the levy as required to trigger the optional use limitation provision of RCW 84.55.050(3) and (4) and, if it did not, may the County spend lawful proceeds from Prop. 1 on other efforts supporting youth and family justice?

E. Did the trial court err in holding that the County's illegal implementation of Prop. 1 is beyond judicial review because no taxpayer took advantage of the five day window for instituting a pre-election challenge to the Prop. 1 ballot title?

IV. STATEMENT OF THE CASE

A. The Property Tax Limit Factor of RCW Chapter 84.55.

This case involves a "levy lid lift," which is a procedure used to raise property taxes above the "limit factor" established by Chapter 84.55 RCW.

This "limit factor" has been repeatedly tightened by the voters and the legislature, thereby restricting the property taxes of local government.

Prior to 1997, "generally, the statute limited property tax increases to a levy of six percent above the total amount levied in the highest of the three previous years." *Wash. Citizens Action v. State,* 162 Wn.2d 142, 146 (2007). In 1997, voters approved Referendum 47, amending chapter 84.55 RCW. "Referendum 47 limited the levy for a taxing district" by pegging the limit factor to the lesser of 106% or inflation for most districts. *Id.* at 146-147.

In 2000, voters adopted Initiative 722 to reduce the limit factor to 102% or inflation for most districts, and just a year later adopted Initiative 747 to reduce the limit factor even further to the lesser of 101% or inflation for most districts. *Id.* at 147-148. The Supreme Court invalidated I-747 in *Washington Citizens Action,* prompting then-Governor Gregoire to call a special session during which the State Legislature reenacted the invalidated amendments to the limit factor. Law of 2007, 1st. Spec. Sess. Ch. 1. CP 318.

Currently, the "limit factor" applicable to most taxing districts, including King County, generally limits property tax levies to 101% of the

district's previous levy, allowing the levy to increase by 1% annually.[1]

B. Levy Lid Lift Options.

Legislation tightening the "limit factor" has typically been advanced as a means to give voters more control over property taxes, since voters can authorize a property tax levy in excess of the limit factor through a "levy lid lift." *See* RCW 84.55.050. *See Wash. Citizens Action,* 162 Wn.2d at 147 (noting that "Referendum 47 ... emphasized that [RCW] 84.55.050's voter approval mechanism could be used to increase property taxes above the limit factor."). "The levy limit may be exceeded when authorized by a majority of voters voting on a proposition to 'lift the lid' of the levy limit in accordance with RCW 84.55.050 . . . . The requirements for the text of a ballot title and measure differ depending on whether the levy limit will be exceeded for a single year or multiple years, up to six consecutive years . . . ." WAC 458-19-045.

RCW 84.55.050 provides two lid lift mechanisms: (1) a levy lid lift that lasts only a single year, which can only be extended in certain instances, RCW 84.55.050(1); or (2) a "multiple year lid lift" that can last no longer than 6 years, RCW 84.55.050(2). King County admits that Prop. 1

[1] The intricacies of how the "limit factor" applies is not material to this lawsuit. For simplicity, this motion treats the limit factor as generally limiting levy increases to one percent.

proceeded under the "single year lid lift" option under RCW 84.55.050(1). CP 30, ¶ 22. King County acknowledges in its Answer that because Prop. 1 is a "nine-year temporary levy lid lift," it cannot be authorized under RCW 84.55.050(2), which can only last for up to six years. CP 30, ¶ 22.

C. Lid Lift Duration and Ballot Title Requirements.

As the Legislature and the People acting by initiative tightened the limit factor, the Legislature also adopted stricter requirements for overcoming the limit factor through a vote. In particular, the Legislature has limited the ability to leverage a voter-approved, short term levy lid lift (one to six years) to increase levy amounts in the longer term.

As discussed, the statutory limit factor allows a government's property tax levies to increase only a limited amount on an annual basis, now roughly 1%. Through a levy lid lift, voters may authorize additional taxes to be collected for one to six years, depending on the option used.

The issue addressed by the legislation at the center of this case is how will levies be calculated in the future. Here, for example, Prop. 1 undoubtedly authorized a single year levy lid lift in 2013. But the statute determines how levies will be calculated in 2014 and beyond; specifically, it determines whether the 2013 levy amount can be used to calculate the permissible levy in 2014 and beyond.

The most important legislation for the purposes of this appeal was enacted in 2008. The statute in effect in 2007 ***prohibited*** the use of a levy lid lift to compute future levy amounts. Laws of 2007, Ch. 380, §2, 1760 (CP 361); RCW 84.55.050 (4) (2007). Thus, if voters approved a levy under the "single year" levy lid lift option of RCW 84.55.050(1), the result would be to raise taxes for only one year. Thereafter, the permissible levy must be calculated as if the voters had not enacted the levy lid lift at all.

The 2008 legislation reaffirmed and strengthened the prohibition against using the dollar amount of a "lifted levy" to compute the maximum levy amount in future years. Applied to the facts of this case, it meant that the 2013 levy amount could not be used to compute the allowable size of the 2014 levy.

The 2008 legislation did allow *informed* voters to authorize the lifted levy amount to be used for the purpose of calculating future years' levies. Balancing the interests of voters, taxpayers, and government, the Legislature authorized a levy lid lift to be used to calculate future levies if the voters were expressly informed that the levy would be used for that purpose. As amended, the statute provided that:

> (3) After a levy authorized pursuant to this section is made, the dollar amount of such levy may not be used for the purposes of computing the limitations for subsequent levies provide for in this chapter, unless the ballot proposition ***expressly*** states that the levy made under this section will be used for this purpose.

> (4) If ***expressly*** stated, a proposition placed before the voters under subsection (1) or (2) of this section may:
>
> > (a) Use the dollar amount of a levy under subsection (1) of this section, or the dollar amount of the final levy under subsection (2) of this section, for the purpose of computing the limitations for subsequent levies provided for under this chapter;
>
> . . .
>
> (5) Except as otherwise ***expressly*** stated in an approved ballot measure under this section, subsequent levies shall be computed if
>
> > (a) The proposition under this section had not been approved;

Laws of 2008, Ch. 319 §§ 3-5, 1668 (CP 363-364) (emphasis added).

Thus, with this 2008 enactment, which is the operative statute in this case, RCW 84.55.040 ***twice*** states the general prohibition on using a levy increased by a lid lift to compute subsequent levies. A local government can ask voters to allow such a use of the levy increase, but RCW 84.55.050 ***three times*** states that this is only allowable when the ballot title "expressly states" that the approved levy lid lift will be used for that purpose.

The political decision to strictly prohibit the use of a levy lid lift to calculate future levies, except with majority voter approval of a statutorily-mandated ballot title, was not easily reached. This was a political compromise reached after over 35 years of legislative debate and action on

this specific issue.[2]

The legislative history shows how important the specific ballot title language is to this statutory scheme. For years RCW 84.55.050 already required the ballot title to "clearly state" levy conditions, but this apparently was insufficient.[3] The Legislature amended the statute to its present form, retaining the "clearly stated" requirement, and additionally stating – not once, but three times – that in order to use the lifted levy amount to compute

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[2] In the original 1971 levy lid lift statute, there was only the "single year" lid lift, but its effect was to increase the lid *permanently*. *See* Laws of 1971, 1st Spec. Sess., Ch. 288 § 24, 1535 (CP 319-339); RCW 84.55.050 (1971) ("After a levy authorized pursuant to this section is made, the dollar amount of such levy shall be used for the purpose of computing the limitations for subsequent levies provided for under this chapter.")

In 1986, the Legislature reversed course, so that levy lid lifts were no longer permanent. The new law provided that after the temporary levy increase was over, "subsequent levies shall be computed as if . . . [t]he limited proposition under subsection (3) of this section had not been approved." Laws of 1986, Ch. 169 §§ 1-2, 553-54 (CP 341); RCW 84.55.050 (1986).

In 1989, the Legislature first recognized the importance of ensuring that voters are provided with accurate information in the ballot title. It was amended to require that the ballot "shall clearly state any conditions which are applicable" to the levy. Laws of 1989, Ch. 287 § 1, 1436 (CP 342); RCW 84.55.050 (1).

In 2003, the Legislature amended RCW 84.55.050 to provide more flexibility for local governments. First, in addition to the single-year lid lift, the Legislature for the first time authorized the option of a multiple-year lid lift of up to six years. Second, it provided local governments with the *option* of using increased levy amount under the lid lift "to be used to compute the limitations provided for in this chapter" for subsequent levies. Laws of 2003, 1st Spec. Sess., Ch. 24 §3, 2406 (CP 344-352); RCW 84.55.050(3)(e) (2003). The statute still mandated that subsequent levies needed to be calculated as if the levy lid lift never occurred, "[e]xcept as otherwise provided in an approved ballot measure under this section." CP 349. Thus, before 1986, a levy increase always was used to compute future levies, but now this was an option that could be given to voters.

The legislative struggle over property taxes continued in 2007, when the Legislature completely repealed the authority of governments to use the levy lid lift amount to calculate subsequent levies. Laws of 2007, Ch. 380 § 2 (CP 353-357) (repealing RCW 84.55.050(3)(e)).

[3] *Id.*

future levies, the ballot title must "expressly" state that. RCW 84.55.050. The Legislative mandate could not be clearer.

D. Prop. 1.

1. The County Council proposed a title that included the express language mandated by RCW 84.55.050, informing voters that the 2013 levy would be used to compute future levies.

King County Council Ordinance No. 17304, enacted on April 16, 2012, placed Prop. 1 before the voters. *See* CP 306-313. Section 3 of that Ordinance stated that "the county council shall submit to the qualified electors of the county a proposition authorizing a regular property tax levy in excess of the levy limitation contained in chapter 84.55 RCW for nine consecutive years, commencing in 2012, with collections beginning in 2013, at a rate in the first year not to [exceed] $0.07 per one thousand [dollars] of assessed value." CP 309-310 at § 3.[4]

Ordinance 17304 proposed a ballot title which – **if presented to voters** – would have "expressly stated" that the 2013 levy amount would be used to calculate future levies. The ordinance proposed a title that would have read, in pertinent part, "[This proposition] would authorize King

[4] The title of Ordinance 17304 called for an election on "a proposition authorizing a property tax levy in excess of the levy limitation contained in chapter 84.55 RCW for a consecutive nine year period at first year rate of not more than $0.07 per one thousand dollars of assessed valuation."

County to levy an additional regular property tax of $0.07 per $1,000 of assessed valuation for collection in 2013. ***The 2013 levy amount would become the base upon which levy increases would be computed for each of the eight succeeding years.***" CP 311 at § 7 (emphasis added). This was not the ballot title that appeared on the ballot. Instead, the County replaced it with something much more ambiguous.

2. Prop. 1 narrowly passed after voters were presented with a ballot title that omitted the express statutory language, leaving unclear whether the 2013 levy would be used to compute later levies and, therefore, how much taxes would be collected after the first year.

Rather than using the ballot title proposed in Ordinance 17304, the County placed before voters a title that stated:

> **Children and Family Services Center Capital Levy**
>
> The King County council passed Ordinance No. 17304 concerning a replacement facility for juvenile justice and family law services. This proposition would authorize King County to levy an additional property tax for nine years to fund capital costs to replace the Children and Family Justice Center, which serves the justice needs of children and families. **It would authorize King County to levy an additional regular property tax of $0.07 per $1,000 of assessed valuation for collection in 2013. Increases in the following eight years would be subject to the limitations in chapter 84.55 RCW**, all as provided in Ordinance No. 17304, Should this proposition be:
>
> - o Approved
> - o Rejected.

CP 367 (emphasis added).

The ballot title proposed in Ordinance 17304 describes a fundamentally different property tax levy than that which was ultimately placed before voters. The Ordinance's proposed title, by using the mandatory express statement, would have extended the $0.07 rate into the future by allowing the 2013 rate to be used to compute subsequent years' levies. In contrast, and as described below, the ballot title placed before the voters authorized the $0.07 rate for only the year 2013.

Prop. 1 was placed on the August 2012 primary election ballot. Fewer than 39% of voters participated.[5] Prop. 1 won in a close race, with the support of only 20% of registered voters.[6]

3. King County admits that it has implemented Prop. 1 as if voters had approved using the 2013 levy amount to compute future levies.

King County admits that it used the dollar amount of the 2013 levy approved by voters ($0.07 per $1,000) to calculate the property tax rate in 2014, 2015, and 2016, and that it plans to continue to use it to calculate annual levies through 2021. CP 280-281, ¶¶ 12-13. To calculate the 2014 levy, King County started with the 2013 levy authorized by voters

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[5] *King County Election Results: Official Final, August 7, 2012*, Past Elections (Aug. 21, 2012, 2:10 pm), at http://www.kingcounty.gov/~/media/depts/elections/results/2012/201208.ashx?la=en

[6] *Id.*

($21,908,910), added a sum for new construction, and multiplied that total by the 101% limit factor. CP 280, ¶ 12. *See also* CP 47, CP 52 (stating that in years 2014 through 2021 "the statutory 101% is applied to the prior year's levy to set the maximum allowable levy or the lid").

King County admits that it used the "dollar amount of a levy under subsection one . . . for the purpose of computing the limitations for subsequent levies." RCW 84.55.050(4). Under this plain language of the statute, this practice is prohibited unless the ballot title expressly informed voters of this practice and gained their approval.[7]

4. King County admits that the Prop. 1 ballot title was unclear about the taxes that could be collected after the first year.

King County admits that the Prop. 1 ballot title was inadequate to determine the precise amount of property tax increase that voters approved after the first year. The County admits that to calculate the levy for the second year, assessor's office staff "relied on the ballot title, explanatory statement, and the ordinance to determine the allowable increase in the levy amount." CP 46. In short, King County admits that the ballot title itself was insufficient to determine the amount of the second year's property tax

[7] King County attempts to ignore the plain language of this statute and argues that express voter approval is only required if the levy increase is permanent. This is not what the statute says. As described below, there is no textual or policy justification for King County's argument.

levy, since it did not expressly state how the first year's levy rate would be used in subsequent years.[8]

E. Procedural History.

Plaintiff discovered the County's over-collection of property taxes in 2016 and diligently brought this matter to the Court. The trial court heard cross motions for summary judgment and dismissed the complaint in its entirety.

V. ARGUMENT

A. Beginning in 2014, King County began implementing Prop. 1 in direct violation of RCW 84.55.050.

There is no question that a narrow majority of voters authorized a $.07 levy for collection in 2013, but voters *did not* expressly authorize the County to use the 2013 levy amount to compute subsequent levies. The County has acted illegally in collecting property taxes as if voters had given this express authorization.

RCW 84.55.050(3) describes the *exact process* that King County is using and states that it is prohibited unless the voters expressly approve it.

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[8] If the County had to resort to the ordinance and explanatory statement to determine whether it could use the dollar amount of the 2013 levy to compute later years' levies, then it cannot argue that the ballot title itself was adequate or that the voters expressly authorized the County's method of computing the levy in later years. Many if not most voters did not read these other materials, and, as discussed, they are irrelevant as a matter of law.

RCW 84.55.050(3) states:

> After a levy authorized pursuant to this section is made, the dollar amount of such levy ***may not*** be used for the purpose of computing the limitations of subsequent levies provided for in this chapter, unless the ballot proposition expressly states that the levy made under this section will be used for this purpose.

(emphasis added).

Almost identical language is contained in other paragraphs of RCW 84.55.050. The Legislature felt so strongly about this disclosure requirement that it stated it three times. Paragraph four states: "If **expressly stated**, a [lid lift] proposition . . . may: . . . Use the dollar amount of a levy under subsection (1) of this section [single-year lid lift], or the dollar amount of the final levy under subsection (2) of this section [multi-year lid lift], for the purpose of computing the limitations for subsequent levies provided for in this chapter." (emphasis added). Paragraph five states: "Except has otherwise **expressly stated** in an approved ballot measure under this section, subsequent levies shall be computed as if the proposition under this section had not been approved." (emphasis added).

The 2012 ballot title provided no such express statement. King County may argue that the ballot title was ambiguous and some voters may have shared its strained interpretation, but ambiguity does not meet the statutory requirement of an "express statement." RCW 84.55.050.

The County argues that if the express statement requirement applied, "the ballot title satisfies this requirement by expressly telling voters how the levy would be computed in [later] years." If that were true, then the County would not have had to study the ordinance and the explanatory statement to determine what limit factor was authorized in years two through nine. *See* CP 279-280, ¶ 9. If the County must resort to extrinsic evidence to interpret the ballot title, as it admits, then the ballot title does not meet the "expressly" stated standard of RCW 84.55.050.

B. Compliance with the express statement requirement was a mandatory prerequisite to King County's use of the 2013 levy amount to compute levies in 2014 and subsequent years.

Where the Legislature has *three times* mandated express ballot title language, and passed legislation for the sole purpose of adding this requirement, it cannot be blithely ignored as King County requests. Given this legislative history, there is no doubt that this requirement is mandatory and must be strictly complied with. *Niichel v. Lancaster*, 97 Wn.2d 620, 625-26 (1982) (look to legislative history to determine whether requirement is mandatory or directory).

It is not up to the County or the Court to decide whether the disclosure was sufficient, because the statute is precise about what the ballot title must state. RCW 84.55.050 *repeatedly* states that the ballot title must expressly state that the dollar amount of the levy will be used for computing

the limit factor in subsequent years. RCW 84.55.050(3), (4)(a), (5). Given the Legislature's repetition and specificity, the County cannot ignore this mandate and argue that the Prop. 1 title is good enough. *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn. 2d 495, 504-06 (2010) (substantial compliance "requires actual compliance in respect to the substance essential to the statute's reasonable objectives" and "must actually accomplish its purpose.").

By using the term "expressly," not just once but three times, the Legislature prohibited the use of an ambiguous title to stretch a single year tax increase into subsequent years. The plain meaning of "expressly" means "in an express manner: explicitly." *Expressly*, Merriam-Webster Collegiate Dictionary (10th ed. 2002). *See also Expressly*, Black's Law Dictionary (6th ed. 1994) ("Expressly" means "In an express manner; in direct and unmistakable terms; explicitly; definitely; directly."); *Richardson v. United States*, 190 F. Supp. 369, 375 (D. Wyo. 1961) ("Presumably Congress used the word 'express' with the intention that it carry its ordinarily accepted meaning.")

In addition, the fact that the Legislature has repeatedly changed this statute reflects that this is a political decision that must be respected by the Courts. Neither King County nor the Courts can ignore the Legislature's explicit mandate.

C. Prop. 1 Did Not Expressly Authorize King County to Use the 2013 Levy Amount to Calculate Subsequent Levy increases.

Prop. 1 did not "expressly state" that the dollar amount of the 2013 levy would be used to compute subsequent levy amounts, as required under RCW 84.55.050. King County clearly knew how to present voters with the express statement mandated by RCW 84.55.050, as shown by the proposed title in Ordinance 17301, but it made the political decision not to do so. Instead, it provided voters with a ballot title that was ambiguous, if not outright deceptive.

As described above the ballot title actually presented to voters – which is the operative document for implementation of the levy – did not contain the required express statement. Rather, it indicated that the $0.07 per $1,000 tax increase applied only in 2013. The ballot title said the proposition "would authorize King County to levy an additional regular property tax of $0.07 per $1,000 of assessed valuation for collection in 2013. Increases in the following eight years would be subject to the limitations in chapter 84.55 RCW." Prop. 1 ballot title.

The amount of the 2013 levy was clear, but how the levy would impact property taxes in future years was anything but clear. At the trial court level, King County argued that even though Prop. 1 omitted the express statement required by statute, a reasonable voter – and especially a

well-informed voter – should have been able to figure it out. The exact opposite could also be argued, since a well-informed voter would understand that the ballot title and rule of law will control how much property taxes are ultimately collected.

The Prop 1 ballot title authorized a 2013 tax increase and then merely stated that future increases would be controlled by RCW chapter 84.55, the chapter that generally limits property tax increases. In no way does the vague reference to 84.55 contain an express authorization for King County to use the 2013 levy to calculate future levies.

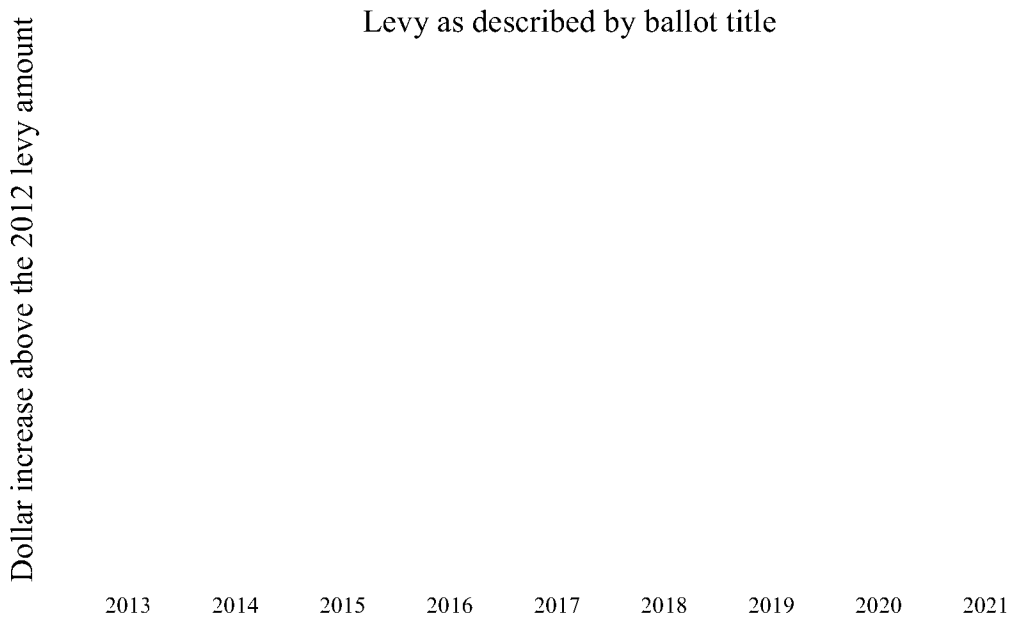
D. King County's failure to comply with the express ballot title requirement cannot be excused merely because *some* voters may have understood King County's revenue goals.

King County's admission that it has used the 2013 levy amount to compute later levies, despite the mandatory statutory language in the Prop. 1 ballot title, is the beginning and the end of the case. It is not up to King County or this Court to second-guess the Legislature's wisdom in requiring a specific express language as a prerequisite to certain tax increases. Similarly, the statute's specific and repeatedly-stated mandates mean that this Court does not need to try to decide whether the Prop. 1 ballot title was "good enough" for some voters to understand the County's revenue goals.

The fundamental goal of the 2009 legislation is to ensure that after the year of the "single year lid lift," subsequent levies must be calculated as

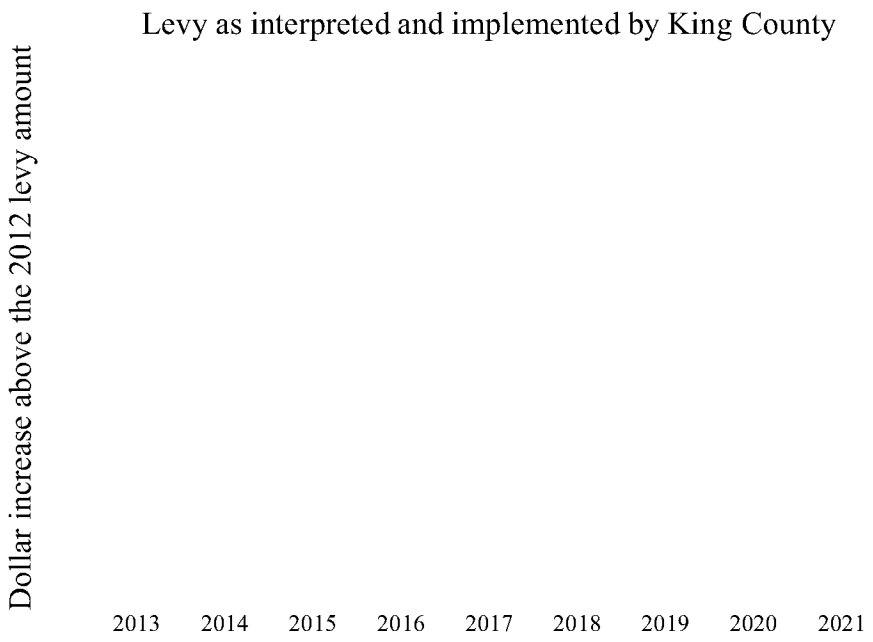
if the levy never occurred. In other words, after 2013, taxes can still be increased for the project, but the allowable increases are calculated as if the one year (2013) levy increase never happened. The allowable levy increases in 2014 and thereafter would be calculated by applying the limit factor *to the 2012 levy amount*.

This simplified chart illustrates the levy increases allowed based upon the Prop. 1 ballot title and RCW 84.55.050:



In contrast, beginning in 2014, King County implemented the levy as if voters had authorized it to use the 2013 levy amount to calculate subsequent levy years, meaning that subsequent years' levies increased by

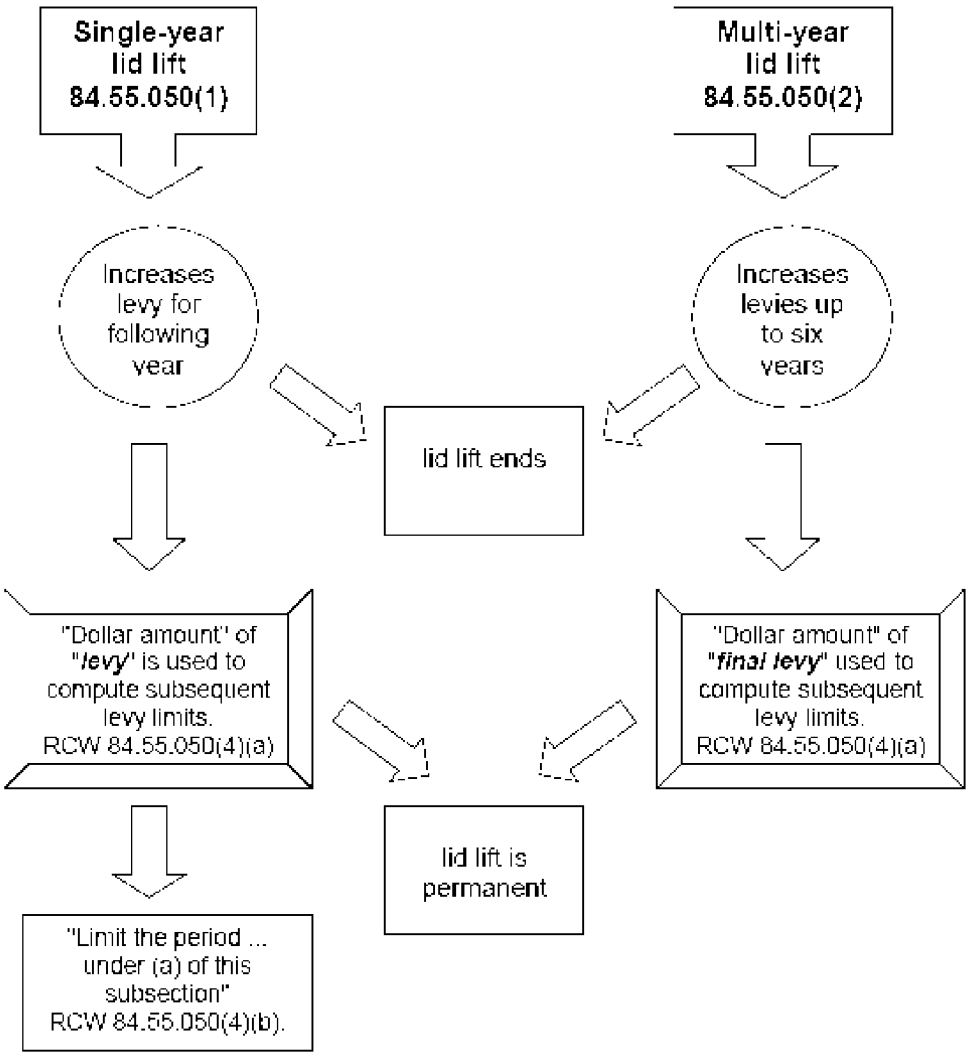
the 1% limit factor *over the 2013 levy amount*. This simplified chart shows how the County implemented Prop. 1:



Given the closeness of the election and the ambiguity of the ballot title, one cannot assume majority approval for the County's implementation of the property tax increases in years 2014 and later, which is the purpose of the express ballot title statement requirement.

E. The County's implementation of Prop. 1 complies with neither of the levy lid lift options.

RCW 84.55.050 is undoubtedly complex, but it is not ambiguous. It provided King County with two options for a levy lid lift to fund its project, as shown on the following chart:



King County could have used a multi-year lid lift for up to six years under RCW 84.55.050(2). But it could not authorize a *nine-year* levy lid lift under this provision.

Alternatively, the County could have asked voters to approve a single-year lid lift under RCW 84.55.050(1) and then expressly informed

voters that the dollar amount of the approved 2013 rate would be used to calculate later years' levy limits. RCW 84.55.050(4)(a).[9] As discussed, the County also did not follow this course of action.

F. Department of Revenue's interpretive rule cannot alter the unambiguous statutory requirements.

The County admits that the Prop. 1 ballot title did not contain the express statement and instead argues that the express disclosure requirement is only required if the approved levy will permanently increase the levy limit. RCW 84.55.050 never limits the express disclosure requirement to permanent lid lifts or even uses the term permanent. The interpretive rule WAC 458-19-045 does not state otherwise and cannot overrule the statute.

WAC 458-19-045 was updated in 2014 in an attempt to reflect many complex amendments to RCW 84.55.050 enacted over a 12 year period, but without a wholesale rewrite. The result is that a rule that is does not fully reflect statutory provisions.[10]

In any event, "An administrative agency cannot modify or amend statute by regulation. Indeed, a rule that conflicts with a statute is beyond an agency's authority and invalidation of the rule is proper." *H&H P'Ship*

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[9] That would have permanently increased the levy limit unless the proposition also included a limited period of the increase under RCW 84.55.050(4)(b).

[10] *Compare*, for example, RCW 84.55.050(4) ("may") and WAC 458-19-045(3) ("must").

v. State, 115 Wn. App. 164, 170 (2003). An "administrative determination will not be accorded deference if the agency's interpretation conflicts with the relevant statute." *Safeway, Inc. v. Dep't of Revenue*, 96 Wn. App. 156, 160 (1999).

This is especially true here because the WAC in question is only an interpretive rule. Such rules are "not binding on the courts at all." *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 446-47 (2005) (DOR interpretive rules obtain no deference from the court).

The rule in WAC 458-19-045 merely "***explains the procedures*** for implementing a lid lift ballot measure." WAC 458-19-045(1) (emphasis added). It thus meets the definition of an interpretive rule, which is "a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers." *Avnet, Inc. v. Dep't of Revenue*, 187 Wn. App. 427, 439 (2015) (citing RCW 34.05.328(5)(c)(ii) and *Ass'n of Wash. Bus.*, 155 Wn.2d at 446-47). Such rules "do not constrain the courts." *Avnet*, 187 Wn. App. at 439.

G. A multiple year levy of nine-year levy is not authorized.

King County may try to argue that its levy is a nine-year multiple year levy. It admits that it has implemented the Prop. 1 levy as if it authorized the $0.07 rate for the entire nine year period. *See, e.g.*, CP 279-

281, ¶¶ 8, 12-13. King County's 2014 Comprehensive Annual Financial Report, dated June 22, 2015, stated "The Children and Family Justice Center is a nine-year temporary levy lid lift approved by the voters on August 7, 2012. CP 8, CP 29, CP 316. However, as the County has acknowledged in this proceeding, multiple year levy lid lifts are limited to six years. RCW 84.55.050(2).

H. King County Has Collected Unauthorized Property Taxes.

Because Prop. 1 did not permit King County to use the 2013 levy to calculate future years' levies, King County has unlawfully collected excess property taxes under Prop. 1.

Because the Prop. 1 ballot title did not contain the statutorily required express statement, the 2013 levy "may not be used for the purpose of computing the limitations for subsequent levies." RCW 84.55.050(3), (4)(a). Instead, "subsequent levies shall be computed as if . . . the proposition under this section had not been approved." RCW 84.55.050(5). Therefore, King County had no authority to carry the 2013 tax rate ($0.07 per $1,000) into subsequent years, as it admits to doing.

It is uncontested that King County has implemented Prop. 1 as if it authorized the 2013 levy to be used for calculating future levies. CP 279-281, ¶¶ 8, 12-13.

In other words, King County has implemented Prop. 1 based upon *the County's intent* – as shown by its ordinance and explanatory statement – rather than based upon the ballot title. However, such extrinsic evidence cannot be used to bolster the ballot title. RCW 84.55.050; *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 217, 11 P.3d 762 (2001) (Courts presume that voters read only the ballot title). *See also Wash. State Grange v. Locke*, 153 Wn.2d 475, 493-94 (2005) (citing *Wash. Fed'n of Emps. v. State*, 127 Wash. 2d 544, 556 (1995)) (Extrinsic documents can only be used to "determine whether the title reflects the subject matter of the act.").

Given these assertions and admissions by King County, this Court should reverse the trial court, hold that the County has collected and retained property taxes in excess of that permitted by Prop. 1, and remand to the trial court to determine the amount of overcharges and proper remedies in the first instance.

I. The Prop. 1 ballot title did not expressly or clearly state a limited purpose of the levy and therefore did not trigger the optional "use limitations" provision of RCW 84.55.050.

RCW 84.55.050 allows property taxes collected under a levy lid lift to be treated as general revenue and used for any purpose. That statute contains an optional provision that allows a local government to limit the

use of the levy proceeds. However, Prop. 1 did not contain the specificity required to trigger this optional provision.

In order to limit the use of levy proceeds, the limited purpose of the levy must be expressly stated. *See* RCW 84.55.050(4)(c) ("***If expressly stated***, a proposition placed before the voters under subsection (1) or (2) of this section may . . . limit the purpose for which the increased levy is to be made . . . ") (emphasis added); RCW 84.55.050(1) ("The ballot . . . ***shall clearly state*** the conditions, if any, the conditions which are applicable under subsection (4) of this section") (emphasis added).

Given the vagueness and ambiguity of the Prop. 1 project description, it cannot be said to "clearly" or "expressly" state the limited project purpose. RCW 84.55.050(1), (4)(c). "[C]ourts should not read into an initiative 'technical and debatable legal distinction[s]' not apparent to the average informed lay voter." *Spokane v. Taxpayers of Spokane*, 111 Wash. 2d 91, 97-98, 758 P.2d 480 (1988). The ballot tile did not provide voters with information that is understandable to an ordinary voter. It failed to use objective terms like detention center, courthouse, and parking garage. Instead it used a phrase that polls well but has no actual meaning to voters.

The County cannot credibly deny that the ballot title was, at best, ambiguous and, at worst, misleading to voters about the scope of the project. The ballot title stated that the levy would be used to "replace the Children

and Family Justice Center, which serves the justice needs of children and families." CP 249. Yet, at the time of the election, there was no such thing as a "Children and Family Justice Center" in King County so it could not be "replaced." *See* CP 97 (noting different name of the existing facility).

The County chose a name to include in the ballot title that was political advantageous but objectively meaningless. The title was utterly deceptive because no one would read the phrase "children and family justice center" to mean a jail for children. The term "children and family justice center" is particularly misleading because Counties throughout the nation – including King County – use the terms "family justice center" and "children justice center" to mean something ***very different*** than this project. In 2003, President George W. Bush created the Family Justice Center Initiative to create "co-located, multi-disciplinary service centers for victims of family violence and their children. The centers, commonly referred to as 'family justice centers' . . . are designed to reduce the number of places victims of domestic violence, sexual assault and elder abuse must go to receive needed services." CP 400. King County, Pierce County, and Thurston County all have family justice centers fitting this description. CP 405-410. *See* CP 403-404 (document from family justice center alliance). In contrast to a youth jail, the family justice centers do in fact "serve the justice needs of children and families." Similarly, "children's justice centers" generally are

facilities designed to provide services to child victims of abuse. *See* CP 411 (Clark County Children's Justice Center "provides a safe, child-friendly place for child victims of criminal-level abuse and their non-offending family members.").[11]

Given its ambiguity, the Prop. 1 ballot title cannot be said to have contained a "clearly" or "expressly" stated limited purpose of the levy proceeds. As required by RCW 84.55.050 and case law, this Court's focus should be on the language of the ballot title itself, standing alone. As a result, the County can use the *lawful* levy proceeds (not the illegal proceeds discussed above) for other projects to help prevent youth detention. RCW 84.55.050 certainly does not require the County to build a new 156-cell youth jail or other specific structures that were not mentioned in the ballot title.

This ruling would advance the goals of voters to support children and family justice. Since the Prop. 1 vote, the County has moved away from the detention-based model that underlies the proposal for a 156-cell youth jail. The current population is less than 30 children a night and decreasing. Under RCW 84.55.050, the County has the flexibility of redirecting lawful

[11] The meaninglessness of this project statement is further illustrated by the County's use of the same title for a previous proposal that would have replaced the courthouse but not the jail. King County Ordinance 16899 (July 27, 2010).

Prop. 1 proceeds towards alternatives to incarceration that address juvenile justice and reduce youth incarceration.

J. A County's illegal over-collection of property taxes is subject to judicial review, notwithstanding the failure of taxpayers to initiate a pre-election ballot title challenge.

The trial court erroneously believed that King County's illegal implementation of Prop. 1 was beyond judicial review because no taxpayer had initiated a pre-election ballot title challenge. This misunderstands the nature of the case. EPIC is not challenging a ballot title; it is ***enforcing the ballot title*** that was placed on the ballot and approved by voters. RCW 84.55.050 made the ballot title the operative document that constrains how much money King County can collect and how it uses the funds collected. EPIC's claims did not exist until King County began to act inconsistently with the ballot title approved by the voters.

The fact that the ballot title would impose a limit on future tax increases is not a basis for a ballot title appeal. That is inevitably the case with any levy lid lift measure. Under RCW 84.55.050, the ballot title becomes the operative limit on future tax increases. Appellants' claim only ripened when the County began to collect property taxes beyond those that were authorized by the approved proposition.

A pre-election challenge could not have tested the sufficiency of the ballot title under RCW 84.55.050 or provided any of the relief sought in this action. Pre-election review of a ballot title is limited and gives the court authority only to "certify to and file with the county auditor a ballot title that it determines will meet the ***requirements of this chapter***." RCW 29A.36.090 (emphasis added). Thus, a ballot title challenge can only address whether the ballot title complies with requirements of Chapter 29A, and primarily the ballot title formulation requirements of RCW 29A.36.050 and 29A.72.050 (providing general format, length, and content requirements for ballot titles). Because the scope of a ballot title challenges is so limited, the process is extremely expedited, can be filed without costs, and provides no opportunity for an appeal. RCW 29A.36.090.[12]

Thus, a pre-election ballot title challenge could not address future non-compliance with RCW 84.55.050 and could not seek any relief for such noncompliance, such as an injunction. A pre-election ballot title challenge is not an avenue to litigate claims or to enforce substantive laws.

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[12] RCW 29A.36.090 ("Upon the filing of the petition on appeal, the court shall immediately, or at the time to which a hearing may be adjourned by consent of the appellants, examine the proposed measure, the ballot title filed, and the objections to it and may hear arguments on it, and shall as soon as possible render its decision and certify to and file with the secretary of state a ballot title that it determines will meet the requirements of this chapter. The decision of the superior court is final, and the ballot title so certified will be the established ballot title. The appeal must be heard without cost to either party.")

Case law clearly establishes that post-election challenges are not dependent upon whether the plaintiff brings a pre-election ballot title challenge and that a pre-election challenge is not dispositive of later proceedings. For example, the Supreme Court has rejected the argument that because a plaintiff brought an unsuccessful pre-election ballot title challenge, it was precluded from bringing a post-election challenge to the ballot title. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wash. 2d 642, 661 (2012) ("*WASAVP*"). In *WASAVP,* the court reasoned that the plaintiff was not challenging "the result of the ballot title determination, but rather, the constitutionality of the law itself." *Id.* In another case, a post-election challenge was brought eight years after the election, despite a pre-election ballot title appeal. *City of Sequim v. Malkasian*, 157 Wash. 2d 251, 253-54 (2006). The court allowed the case to proceed because the Court could still grant the relief of invaliding the initiative. *Id.* In the majority of post-election challenges to an initiative based upon a ballot title defect, there was no pre-election challenge.[13]

[13] One of the seminal cases on ballot title challenges, *Amalgamated Transit Union Local 587 v. State*, is a post-election ballot title challenge containing no suggestion that any pre-election challenge occurred. 142 Wn.2d 183, 217, 11 P.3d 762 (2001); *see also City of Burien v. Kiga*, 144 Wn. 2d 819, 823, 31 P.3d 659 (2001) ("the first lawsuit challenging the constitutionality" of the initiative was filed two days after the election took place); *see also Cf. Swartout v. Spokane*, 21 Wash. App. 665, 674-75, 586 P.2d 135, 141-42 (1978) ("Generally, a void legislative act is of no effect and may be successfully attacked at any time.")

The trial court erred in holding that a pre-election ballot title challenge is a prerequisite to challenging the County's later non-compliance with levy limits. That ruling, if allowed to stand, would mean that as long as nobody brought a pre-election ballot title challenge – which is almost always the case – a local government would be immune from later suit and could ignore levy limits and the will of the voters with impunity.

VI. CONCLUSION

For the reasons stated herein, the Court should reverse the trial court and remand for the reasons stated herein.

Dated this 15th day of February, 2017.

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DECLARATION OF SERVICE

I, Jessie Sherwood, hereby declare under penalty of perjury under the laws of the State of Washington that on February 15, 2017, I caused the foregoing to be filed with the Court of Appeals, Division II and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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SIGNED this 15th day of February, 2017, at Seattle, Washington.

Jessie C Sherwood

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